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No. 522

IN THE

Supreme Court of the United States

ERICH SPILLMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OCTOBER TERM, 1968

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COMES NOW your petitioner herein, Erich Spillman, by and through his counsel, Philip M. Haggerty of the State of Arizona and a member of the bar of this Court, and respectfully petitions the Court to issue its Writ of Certiorari to the Circuit Court of Appeals of the United States for the 9th Circuit to review the decision of that court in the cause entitled, "Erich Spillman v. The United States of America," Cause No. 23092.

A. DECISION SOUGHT TO BE REVIEWED.

The decision sought to be reviewed is entitled, "Erich Spillman, Appellant, v. The United States of America, Appellee," Cause No. 23092, United States Court of Appeals for the 9th Circuit. It is reported at —— F.2d ——. The text of the opinion is reproduced as Appendix A hereof.

B. GROUNDS UPON WHICH REVIEW IS SOUGHT.

1. The opinion of the United States Court of Appeals was rendered on June 17, 1969.

2. Petitioner's motion for rehearing was denied on July 24, 1969.

3. The jurisdiction of this Court is founded on 28 U.S.C. 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW.

I

Where in a prosecution for mailing of materials which is stipulated to be obscene, and where the mailing was by the photographer to a commercial film developer for return to the same photographer, does not due process require an instruction that the jury must find that the defendant photographer had a specific intent to arouse the prurient interest of the recipient where such an instruction is requested and denied?

II

Where the Department of Justice has circulated a memorandum letter advising selective and limited prosecution in obscene mailings cases that are clearly subject to prosecution by act of Congress, and where such enforcement and prosecution is recommended in only a few limited areas, is not the prosecution of

this defendant, dependent as it was upon the whim of a particular United States Attorney and his interpretation of or knowledge of or lack of knowledge of such memorandum such grossly unfair selective prosecution as to constitute denial of due process?

III

Is it not also a denial of due process to submit a case for obscene mailings to a jury solely upon the statute defining the offense without either a prior judicial determination of the applicability of the memorandum of selective prosecution or in the alternative without an instruction to the jury containing the terms of the selective enforcement memorandum advising prosecution only in cases of repeated offenders or aggravated circumstances?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Constitution of the United States

Article of Amendment I, Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article of Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes

United States Code.

18 U.S.C. 371.

"If two or more persons conspire either to commit any offense against the United States . . ., and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

. . . ."

18 U.S.C. 1461.

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; * * * is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, * * *."

E. STATEMENT OF THE FACTS.

The facts of this case are simple and undisputed. The petitioner herein and his co-defendant arranged to take photographs of two persons, a male and a female, acting out a scene of sexual intercourse. The scenes were photographed with one camera using color film and another using black and white film. The petitioner took a black and white, 16 mm film, to a store in Phoenix and was advised by the employee of this store that the film would have to be developed by a commercial film processor in Denver. The petitioner gave the undeveloped film to the store employee who mailed it to the film processor in Denver. It was there processed and turned over to the United States Postal Inspector. The color film was of a type which has a prepaid processing agreement, and this undeveloped film was mailed directly by the de-

fendant and petitioner to the same film processor in Denver, where it was likewise turned over after developing to the United States Post Office inspectors.

Prior to the trial of the case, the defense counsel and the United States Attorney entered into a formal stipulation to the effect that the film as developed would constitute obscene material within the meaning of 18 U.S.C. 1461.

The petitioner Spillman and his co-defendant were indicted on one count of conspiracy in violation of 18 U.S.C. 371 and two counts of mailing obscene material through the United States mail in violation of 18 U.S.C. 1461. The petitioner herein was convicted on all three counts and sentenced to concurrent sentences of two years each upon each count.

His co-defendant who was granted a direct verdict upon one count of mailing was found guilty on one count of mailing and one count of conspiracy, received a suspended sentence, and did not appeal the conviction.

At the close of all the evidence the defendants moved for directed verdicts of acquittal which were denied. Certain instructions were requested and among those refused was a request by defendant Spillman, Defendant's Requested Instruction No. 1 (Record of Proceedings, page 231). The instruction is set forth herein in haec verba.

Defendant's Instruction No. 1.

> In addition to the elements incumbent upon the Government to prove the defendant's guilt which elements I have or will instruct you upon, the Government must prove beyond a reasonable doubt that the defendant possessed a specific intent and purpose at the time the materials were mailed. The specific intent and purpose must consist of a state of mind of the sender towards the intended recipient, in that the sender specifically intended at the time of the mailing that the materials when received and viewed by the recipient would arouse or appeal to the prurient interests of the recipient.
>
> *Gagliardo v. U.S.*, 366 F.2d 720, 724 (9th Cir. 1966)
> *Mishkin v. State of New York*, 383 U.S. 502, 509 (1966)

F. QUESTIONS OF CONSTITUTIONAL LAW WERE RAISED PRIOR TO THIS PETITION.

As we have heretofore pointed out the requested instruction was presented to the trial court and is contained in the transcript citation noted hereinabove. The argument concerning the Government's memorandum reflecting that cases involving obscene mailings should only be prosecuted where repeated offenders are involved, or in circumstances "which may be fairly characterized as aggravated" was argued to the trial court by reference to this Court's decision in *Redmond* v. *U.S.*, 384 U.S., 264 (1966), and was specifically presented by motion for judgment of acquittal (Transcript of Record, pages 13-14). While this specific motion was filed by Mr. Cucitro, the co-defendant only, this petitioner joined in open court in all of the motions made by his co-defendant (Reporter's Transcript of Proceedings, page 225).

H. ARGUMENT

Summary of Argument

The petitioner's argument is twofold and neither aspect has been determined on its merits by this Court. Each aspect has two facets which we think can be clearly stated. Initially, is it not essential that there be a specific intent to arouse the prurient interest of the recipient in order to sustain a conviction under 18 U.S.C. 1461? Obviously many persons have placed these and other admittedly obscene materials in the United States mails, knowing that they were obscene and intending to mail them. But because these mailings were made by Post Office or Court officials or Government attorneys, there has been no prosecution. Obviously, therefore, something more is required. The element which is missing in these latter mailings is an intent by the sender that the recipient would or would not be likely to view the materials for their prurient effect. This specific intent would therefore appear to be part of the crime, and the jury was not instructed to this effect in its consideration of the petitioner's case. The jury should have been so instructed.

The obverse facet of this aspect gives rise to the question of how

a person could be convicted of mailing obscene materials to himself. All statutes relative to obscenity have the aspect of public dissemination and the legitimate interest of the state in controlling publication and distribution to the public at large. The mails as a means of dissemination have thus been found to be a legitimate subject of control. But where an individual mails something to himself, there is no aspect of distribution, and the Government's interest in prosecution collapses.

The second aspect of the case is perhaps even more singular and unique. The United States Government has deliberately chosen to ignore the direct and comparatively simple terms of the acts of Congress and to place an extremely broad power of selective enforcement in the hands of each of the United States Attorneys. The norm of enforcement is subjective and vague; and by no stretch of the imagination provides a reasonably ascertainable degree of certainty. Each of the many United States Attorneys across the land is provided with a completely free hand to determine whether circumstances are "aggravated." The chances of any reasonable degree of uniformity are nil. The operative causes of prosecution therefore no longer depend upon whether a prosecutor reads the statutes, but upon whether he reads his mail. It is prosecution by whim and not by law.

At the very least this defendant should have been entitled to be heard by either a trial court or the jury on the issue of whether or not he was involved with repeated offenses (and there were no other offenses) or aggravated circumstances (and none are disclosed herein). Instead, only the statutory policy was presented for consideration. No word was heard of the official (although nonstatutory) policy despite the fact that this policy had been recognized in at least two recorded cases; one in this Court, *Redmond* v. *U.S.*, 384 U.S. 264, and one in the circuit in which this case was tried, *Cox* v. *U.S.*, 370 F.2d 563 (9th Cir. 1967). The memorandum policy has become part of the law of obscene mailings and as any other aspect of law calling for the determination of a factual issue, should have been made the subject of judicial process in the prosecution of this petitioner.

Due process requires an instruction to the jury as to the specific intent of the accused to arouse the prurient interest of the recipient.

The 9th Circuit in its opinion on the matter has apparently arrived at the conclusion that the statutes involved herein call for conviction upon the basis that the offense is malum prohibitum and requires no specific intent other than the doing of certain acts. Specifically the Court held as follows:

> "This Court holds that when the defendant has agreed to a stipulation as to the obscenity of the material placed in the mails, the only intent required is the intent to mail or knowingly deposit in the mails such obscene materials."

Now the stipulation involved herein was as to a fact which would otherwise have been necessary to have been proved in open court at the trial. The fact concerned was whether or not the materials were obscene within the meaning of the statute. The 9th Circuit has held that therefore once it is clear that the materials are obscene, and once there is an intent to place these materials which are admittedly obscene in the mail, nothing more need be proven. By that Circuit's determination, therefore, the postal inspectors who mailed these films from Denver to the Post Office inspectors office in Phoenix were equally guilty with this defendant. The 9th Circuit holds in the next paragraph that they could not be prosecuted because "obviously, when an agent mailed the evidence (films) during the course of the investigation it was without any specific intent to violate the law." In the first paragraph the 9th Circuit has said that the only intent necessary is that to deposit in the mails, but in the following paragraph the Court refers to a "specific intent to violate the law." If the act prohibited is placing in the mails, then what is the "intent to violate the law"? We believe that perhaps inadvertently the 9th Circuit was misled as to the thrust of the argument. This petitioner does not claim that because Government officials are not prosecuted, he cannot be prosecuted. The example was used only to point out the obvious truth that something more than placing known obscene materials in the United States mails is required to constitute a criminally prosecutable act.

What more can be required? Obviously Government officials are mailing these materials solely for use as evidence in a case. They have no intent to arouse the prurient interest of the recipient. It is merely a matter of business and the mails are the most convenient way to carry it out. Perhaps in many prosecutions under this statute it would be a relatively simple matter to prove or to arrive at a reasonable conclusion from the evidence that a pornographic materials distributor intends to arouse the prurient interest of the recipients of his mailings. But since there can be mailings which have no intent to arouse the prurient interest of the recipient, as in the Government inspectors' mailing of evidence, and there can be cases in which there is such an intent, a factual distinction exists as a matter of law in any mailing of obscene materials and this distinction must be the subject of instruction to a jury.

We have said initially that this aspect of the case is unique and therefore worthy of this Court's consideration. We therefore have no cases that are specifically and directly and clearly on point. This Court, however, in *Mishkin* v. *State of New York,* 333 U.S. 502 (1966) held as follows:

> "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest of its intended and probable recipient group . . . ."

While this case of course did not involve the United States mails or the statute at issue herein, it recognizes a policy of consideration of the recipient in any case involving distribution of obscene materials.

In a case involving radio broadcasting in the 9th Circuit, *Gagliardo* v. *U.S.,* 366 F.2d 720 (9th Cir. 1966) an instruction that no specific intent was required was held to be reversible, and the 9th Circuit did then recognize that the intended recipient and intended use of the questioned material are relevant considerations.

It may be urged that in light of the actual factual situation presented herein there was no real recipient and that such an instruction was therefore unnecessary. If it is the position of the United

States Government that there was no true recipient, i.e., that this was a mailing by Mr. Spillman to himself, then we are concerned with the second facet of this first aspect of the case, i.e., can a person ever be convicted of mailing obscene material to himself. But if the Government takes the position that the intervening film processor was a recipient, then the question of intent to arouse the prurient interest of this recipient becomes a valid factual issue. There would be a major factual consideration of whether or not a person mailing a roll of undeveloped film to a commercial film processor ever intended that the processor ever view the developed film other than perhaps a brief scanning of a few frames to determine whether or not the developing process was actually completed. In short, it cannot be presumed that Mr. Spillman mailing the film to a processor ever intended that the processor even view the film, and this question of specific intent and a necessary instruction therefor is of critical importance. We further believe that an instruction as to the specific intent of the recipient of the mailed matter is required in all cases of obscene mailing.

There can be no conviction of obscene mailings where the recipient of the matter mailed is also the sender of the matter mailed.

We believe that *Redmond* v. *U.S.*, 384 U.S. 264, is controlling in this case. The matters of distinction between the two cases are wholly irrelevant. In *Redmond* the pictures were taken by Mr. and Mrs. Redmond of themselves, and mailed to a commercial processor who apparently solicited this type of photographic business, and who thereafter returned the films to Mr. and Mrs. Redmond. In our present case there were parties other than the photographers involved in the "scene" photographed, and the commercial processor apparently did not solicit this particular type of photographic business, but solicited all types of development of films. These distinctions are minor and apparently of no controlling importance. The 9th Circuit felt differently, but could afford no statutory, case, or logical basis for such a distinction.

The taking of the pictures themselves, whether or not of the photographers or of third parties, involved no violation of Arizona State law. Certainly no Federal law controls the taking of such

photographs. No state statute of Arizona prohibits acts of intercourse between consenting adults. There was therefore nothing more criminal about photographing the actors herein than there was in Mr. and Mrs. Redmond photographing themselves. And as pointed out hereinabove there is no reason to believe on the part of anyone sending films to a commercial film processor that the processor would ever look at the films. Undoubtedly thousands of rolls of film are handled by such processors annually and if they ever took time to look at all of the pictures of vacationing couples, birthday parties, visits of dear relatives, etc., they could not possibly complete the work which they advertise they will do. In point of fact, there was much more likelihood that the film processors in *Redmond* would be true recipients inasmuch as they deliberately solicited this type of photography, and presumably might check the devolped films to see if they were in accordance with the club membership purposes. In short, the conduit here would be less of the recipient than the conduit in *Redmond,* and the fact that the scene was of actors rather than the individuals themselves adds no greater degree of criminality. The distinctions drawn by the 9th Circuit are not valid or real, and we submit that under *Redmond* v. *U.S.,* supra, this cause should be reversed.

We believe that *Redmond* v. *U.S.* answers the arguments of private correspondence. We would like to merely state, however, that it is the position of the petitioner that legitimate controls over the dissemination of information of a prurient or obscene nature has been a legitimate subject of statutory regulation. But it is the offense of public distribution or dissemination that has been prohibited. The mail, as a most convenient source of this public dissemination, is therefore a legitimate subject of Congressional inquiry. In one mailing case, to use the words of the 2nd Circuit in *United States* v. *Klaw,* 350 F.2d 155 (2nd Cir.)

> " 'Obscene' material . . . may also sometimes be suppressed and penalized because, like a common law nuisance, it constitutes an unreasonably offensive intrusion into the lives of persons who cannot reasonably avoid it."

This case dealt with mailings primarily to young men of possibly

sadistic material. The element of public distribution was of course present. Here there was no public distribution, merely a mailing by Mr. Spillman to himself. In the absence of such public dissemination, the mails are not used to convey offensive materials to persons other than the recipient, the Congressional interest in such control is as absent as it would be in the case of private conversations held between persons in their own home. Even under Arizona State law all of the statutes relative to obscenity and public decency refer to crimes connected with sale or commercial distribution and none at all to private use. See *Arizona Revised Statutes,* Article 28, A.R.S. 13-531.01 through 531.35. While we believe that Redmond alone is sufficient, we merely point this out to buttress our argument that this is private correspondence and not the legitimate subject of Federal prosecution.

This prosecution in view of the Department of Justice Memorandum constitutes grossly unfair, selective prosecution.

This Court in *Redmond* v. *U.S.* recognized the United States Department of Justice memorandum dated August 31, 1964. To quote this Court:

> "The memorandum states, in pertinent part, that prosecution for mailing private correspondence which is allegedly obscene 'should be the exception confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated'."

We presume that this memorandum was circulated to all ninety United States Districts and to the District Attorneys therein. We can only imagine from the conduct of prosecution of this case that it was not even read in the District of Arizona. As we pointed out in the 9th Circuit Court of Appeals, the complaint actually issued on February 9, 1966, and the mailing constituting Count Three was allegedly done on or about February 3, 1966 (Transcript of Record, pages 2-3). The Phoenix Post Office inspector stated that he received the exhibit containing these films from Denver on February 12, 1966 (Record of Proceedings, page 145). Thus the complaint was filed before the United States Attorney or any Post Office inspector in Phoenix even had the films. This pell mell pro-

secution is certainly in contravention of the memorandum and merely illustrates the wide variation of interpretation that could and obviously has been placed upon this memorandum. The net result is that no person in the United States has any reasonable knowledge or method of arriving at a conclusion as to whether the act of mailing certain material is or is not subject to prosecution. The 9th Circuit in treating this argument stated that the memorandum is "wholly voluntary in nature and is not founded on case law." We believe that at least since *Redmond* v. *U.S.* it has been founded on case law, and this Court at least once and the 9th Circuit at least once have implemented the policy by dismissing prosecutions filed in contravention of this memorandum. Granted that in both cases the Solicitor General was consulted, there is no record of even an inquiry being made in this case, and we do not have the views of the Solicitor General. If Redmond and Cox were entitled to those views, we believe Spillman is also.

We realize that in all cases there is a certain degree of discretion lodged in prosecutors, but we do not believe that the United States Government should be allowed to deliberately open the door to discriminatory treatment of certain classes of persons accused of a crime and slam it shut in the face of one of them. This defendant did not ask for discriminatory treatment. The Government promulgated this method of prosecution, and should abide by it.

Since the Deaprtment's memorandum is now embodied in case law, we feel that it is so vague and so without meaning to persons of common understanding and ordinary intelligence, that all prosecutions under the obscene mailing statutes must be classified as based on unconstitutionally vague norms concerning definition of the crime. The concept of what constitutes "aggravated circumstances" may very well vary between a district attorney in the eastern district of Kentucky and the district attorney for the northern district of California. This Court has heretofore expressed many times the viewpoint that prosecutions and definitions of crimes must be uniform throughout the United States if Federal laws are involved. Congress presumably acts for the entire United States. This memorandum imposes on each District Attorney a degree

of discretion that is wholly contrary to that of the statute itself, entirely misleading, and simply asks for discrimination against individual defendants. This is prosecution by whim and not by law.

At the very least, there should be a judicial or factual determination of the issues presented in the memorandum.

It is clear in this case that the Department of Justice gave no consideration to the norms contained in its own memorandum. It could hardly have done so if the prosecution was initiated before the films were even received in the city in which the prosecutor's office is located. But since the policy is an official policy of the Department of Justice, we believe that Mr. Spillman was entitled to some hearing on whether or not he was (a) a repeated offender or (b) whether the circumstances were aggravated. In all criminal prosecutions, the jury is instructed as to the law of the case and the crime and usually by the simple expedient of reading the Act of Congress which the defendant is alleged to have violated. This of course was done in our instant case. All persons are presumed to know the law, and therefore to know the case law. Therefore, by presumption Mr. Spillman was aware of the Department of Justice memorandum as it was embodied in prior decisions of both the circuit in which he was tried and in the United State Supreme Court. We realize of course that the presumption is one of policy and not one of actuality, but if a person is presumed to know aspects of law which are unfavorable to him, he is entitled by the presumption to know aspects of law which are favorable to him. He therefore might well consider that he is entitled to a hearing as to whether or not any individual mailing he might make would be a repeated offense, or one involving aggravated circumstances. These two norms could be considered questions of either law or of fact, but in any event they would be entitled to a judicial determination by the trial court or by the trial jury. As we have mentioned above, the memorandum decision embodied in *Redmond* was pointed out to the trial court. No specific request for instruction was made, probably perhaps because this would be somewhat unprecedented. But since the Government

obviously did not give consideration to the memorandum in this case when it might very well have in hundreds of other cases which never reached the prosecution stage simply because of the memorandum, then we believe that Mr. Spillman would be entitled to the same consideration judicially. It is the petitioner's position that this was not a "repeated" offense, and that there was no justification for finding the circumstances aggravated in any way whatsoever. The lack of aggravation of course is supported by the fact that this was a mailing to himself, and not to unsuspecting and unprotected third parties. But the petitioner here went on trial with only the statute being read to the jury and without any other consideration presented for their deliberations. These considerations might well be controlling factors in every other United States District subject to Federal court control. Since no one has any means of evaluating the degree of enforcement, or the reasons why prosecutions are not brought, in cases where they are brought the considerations that have led to the lack of prosecution in other cases should be presented to the trier of fact or the trier of law when a person faces a prison term. Due process demands at least this much.

CONCLUSION

As the record will note these defendants were also convicted of conspiracy. Our arguments in the 9th Circuit concerning the conspiracy are basically factual, and are therefore not the subject of this petition. However, it is felt that if this cause is reversed on the issue of obscenity, the necessity for instructions as to intent, or the necessity of instruction or ruling as to aggravated circumstances, the conspiracy count must fail also.

It is therefore respectfully submitted that in view of the foregoing argument, the decision of the Court of Appeals for the 9th Circuit requires reversal as constituting a clear contravention of the policies of the United States Government as expressed in the memorandum letter of August 31, 1964, as reinforced by this Court in *Redmond* v. *U. S.*, and further as upholding prosecution and conviction in violation of the First and Fifth Amendments to the Constitution of the United States.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERICH SPILLMAN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 23,092

[June 17, 1969]

On Appeal from the United States District Court for the District of Arizona

Before: DUNIWAY and CARTER, Circuit Judges, and CROCKER, District Judge

CROCKER, District Judge:

Erich Spillman, appellant herein, was charged by indictment in the United States District Court for the District of Arizona of one count of conspiracy in violation of 18 U.S.C. § 371 and two counts of mailing obscene material through the United States mails in violation of 18 U.S.C. § 1461. After a jury trial, he was convicted on all three counts and was sentenced to concurrent sentences of two years on each count. He filed a timely appeal to this court which has jurisdiction under 28 U.S.C. § 1291.

Co-defendant Cucitro, found guilty on counts one and three of the indictment, received a suspended sentence and has not noticed an appeal.

Title 18 U.S.C. § 1461 provides in pertinent part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; * * * is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, * * * * *."

The parties in this case have stipulated that the motion pictures (showing acts of sexual intercourse) which are the subject matter of this prosecution and appeal are in fact obscene within the meaning of Title 18 U.S.C. § 1461. Appellant and the co-defendant Cucitro arranged for two persons to act out a scene which the two of them were to photograph at a local Phoenix motel. Apparently one defendant photographed the scene with one camera, and the other photographed the same scene with a different camera. One of the rolls of film was a black and white 16mm film. This film was taken to a local camera store in Phoenix by the appellant. The co-defendant accompanied the appellant to the camera store. The appellant engaged in a short discussion with the employee of the camera shop concerning the processing of the film, who then sent the undeveloped film to a commercial processor in Denver. During the conversation between Spillman and the camera store employee, the co-defendant was "wandering around the store" but apparently in close proximity of the appellant and the employee.

After the film was mailed to Denver it was processed and then turned over to the United States postal inspector by the film processor. The developed film was then sent to Robert Fox, a postal inspector in Phoenix. After receipt of the film, Fox showed it to one of the "actors" in the film who identified it.

The 8mm roll of color film was of a type which has a prepaid processing agreement whereby the charge for processing is paid for at the time the film is purchased and the commercial processor develops the film and returns it to the purchaser by virtue of a

contract with the film manufacturer. The 8mm film was connected to the appellant, Spillman, by the testimony of a handwriting expert who stated that the envelope used to mail the film to Denver was in Spillman's handwriting. The mailing envelope also possessed Spillman's home address on it as a return address. This film was received by the same film processing concern in Denver, developed and likewise turned over to the same postal inspector and in the same manner mailed to Mr. Fox in Phoenix, where it was also similarly identified.

Shortly before the close of the Government's case, and upon the representation of the Assistant United States Attorney that the further evidence to be presented could not connect defendant Cucitro with the 8mm film, the court directed a dismissal as to the defendant Cucitro on that count, Count Two of the indictment, which involved the 8mm film. At the close of all the evidence, the defendants moved for directed verdicts of acquittal which were denied.

Appellant contends:

1. That the memorandum letter circulated by the Department of Justice to the United States Attorneys has unofficially promulgated a policy of non-prosecution of offenders within a class which the appellant falls;

2. That since there is no evidence that the appellant intended that the material mailed be other than private or that the photographs be seen by others than themselves, the conviction must be vacated and the indictment dismissed;

3. That the only mailing by the appellant was the mailing of undeveloped film which is incapable of being obscene, lewd, lascivious, indecent, filthy, or vile;

4. That there was error in the trial court's refusal to give co-defendant's requested instruction Number 1;*

---

*Defendant's Requested Instruction No. 1

In addition to the elements incumbent upon the Government to prove the defendant's guilt, which elements I have or will instruct you upon, the Government must prove beyond a reasonable doubt that the

5. That the defendant was deprived of due process of the law because the governmental employees (the postal inspectors) were not prosecuted for the mailing of the developed films; and

6. That there was insufficient evidence to allow a jury to determine whether there was the existence of a criminal conspiracy or not.

The main thrust of the appellant's argument is that the prosecution of the appellant violated a policy of the Department of Justice. The appellant pointed out that the United States Department of Justice circulated a memorandum, dated August 31, 1964, to all United States Attorneys which, to quote the United States Supreme Court in *Redmond* v. *United States,* 384 U.S. 264, declares:

> "The memorandum states, in pertinent part, that prosecution for mailing private correspondence which is allegedly obscene should be the exception confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated.' "

This court cannot inquire into the motives of the United States Attorney for prosecuting this appellant. The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws. The policy which the appellant complains of is wholly voluntary in nature and is not founded on case law which would require this court to implement such a policy. *Ackerman* v. *United States,* 293 F.2d 499 (9th Cir. 1961); *Armijo* v. *United States,* 384 F.2d 694 (9th Cir. 1967), certiorari denied, 390 U.S. 974; 33 S.Ct. 1074; 19 L.Ed. 2d 1186 (1968). The cases which the appellant cited involve instances where a dismissal

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defendant possessed a specific intent and purpose at the time the materials were mailed.

The specific intent and purpose must consist of a state of mind of the sender towards the intended recipient, in that the sender specifically intended at the time of the mailing that the materials when received and viewed by the recipient, would arouse or appeal to the prurient interests of the recipient.

Gagliardo v. United States, 366 F.2d 720, 724 (9th Cir. 1966); *Mishkin v. State of New York,* 383 U.S. 502, 509 (1966).

is requested by the United States of America. There has been no such request made by the United States of America in this case.

The policy complained of by the appellants does envision prosecution of obscenity offenses committed by sex offenders, repeated violators, or cases involving aggravated circumstances. Unlike the situation in *Cox* v. *United States,* 370 F.2d 563 (9th Cir. 1967), the record fails to establish that the film was to be used solely for the amusement of the appellant. Also, the obscene pictures were of individuals who were "actors" rather than of the defendants. See, *Redmond* v. *United States,* supra. The trial court did not err in denying motion for judgment of acquittal made on the grounds that a governmental policy had been violated.

The appellant attempted to buttress his argument that the prosecution of this case violated a policy of the Department of Justice with the contention that the processing of these film was private correspondence, as essentially the appellant was mailing the pictures to himself. The appellant urges that he did not even have another party to whom the pictures were sent, as in *Cox,* so this is even more clearly private correspondence. To the contrary, the film processing concern reported the receipt of the film to the postal inspector. There is no evidence that the company consented to the exchange of the obscene film.

The appellant argues the only thing which was mailed, or caused to be mailed, was undeveloped film. The appellant urges that until it is processed it is a mere potentiality and not an actuality. The fact that the films sent through the mails were not developed when mailed does not preclude a conviction for conspiracy or for the substantive offenses. *United States* v. *Peller,* 170 F.2d 1006 (2nd Cir. 1948).

The defendant submitted a requested instruction stating that before the jury could find the defendants guilty they must find that the defendants had the specific intent to arouse or appeal to the prurient interests of the recipient. See, footnote (*) which sets out the requested instruction Number 1 in haec verba. The issue of whether material appeals to prurient interests comes within the definition of obscenity. *Ginzburg* v. *United States,* 383

U.S. 463; 86 S.Ct. 942; 16 L.Ed. 2d 31 (1966); *Mishkin* v. *State of New York,* supra; *Roth* v. *United States,* 354 U.S. 476; 77 S.Ct. 1304; 1 L.Ed. 2d 60 (1957). The appellant cannot stipulate to obscenity in order to avoid having the jury view the film and then claim they are not really obscene within the definition or meaning of the statute.

The trial court gave an adequate instruction on specific intent (R.T. page 276). *Gagliardo* v. *United States,* supra, cited by the appellant, is distinguishable in that there was not a stipulation in that case as to the element of obscenity. In the present case there was no dispute on the issue of the obscene nature of the films; nor did the trial court give a "secret" instruction such as the one held in *Gagliardo* to be inconsistent with the instruction on specific intent. This court holds that when the defendant has agreed to a stipulation as to the obscenity of the material placed in the mails, the only intent required is the intent to mail or knowingly deposit in the mails such obscene material.

The question of whether the governmental employees connected with the postal authorities have violated the law would not be relevant to the issue of appellant's guilt or innocence. Obviously, when an agent mailed the evidence (films) during the course of the investigation it was without any specific intent to violate the law. The appellant's contention that he was being denied due process of the law on account of the non-prosecution of the governmental employees is wholly lacking in merit.

The appellant next contends that there is not one iota of evidence that the defendants entered into a consipracy to place anything in the United States mails. The evidence clearly shows that appellant and co-defendant were present at the planning stages of the film. Both participated in the actual photograph of the movie. The camera store employee told appellant that the films would have to be sent to Denver in order to be developed.Defendant Cucitro was within ten feet of the appellant and the store employee's voice was audible. The record contains sufficient evidence to allow a jury to determine whether or not a criminal conspiracy exists.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No 522

ERICH SPILLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1969. A petition for rehearing was denied on July 23, 1969. Pursuant to application on August 23, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 20, 1969.[1] The petition was filed on August 27, 1969.

[1] Although petitioner asserts (Pet. 2) that a petition for rehearing was denied by the court of appeals on July 24, 1969, the record reveals the date of denial to have been July 23, 1969. See R. Vol. I. The application for an extension of time within

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for mailing obscene material in violation of 18 U.S.C. 1461, where the obscene nature of the matter mailed was stipulated, the trial court properly refused to give petitioner's requested instruction that the jury could find him guilty only if it found that he had a specific intent to arouse the prurient interest of the recipient of the material.

2. Whether the present prosecution is consistent with the policy of the Department of Justice regarding 18 U.S.C. 1461, as set forth in *Redmond* v. *United States*, 384 U.S. 264.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on two substantive counts of mailing obscene material, in violation of 18 U.S.C. 1461, and of conspiring with one Cucitro (a co-defendant convicted on the conspiracy and one substantive count) to commit those violations. 18 U.S.C. 371. On March 4, 1968, he was sentenced to concurrent terms of imprisonment of two years subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App.).

The evidence, which is set forth in the opinion be-

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which to file the present petition for certiorari was thus made more than thirty days following the denial of rehearing and was out of time under Rule 22(2) of the Rules of this Court.

low at Pet. App. 18–19, is not in dispute. Briefly summarized, it showed that petitioner and Cucitro arranged for two other persons, a man and a woman, to act out a scene of sexual intercourse at a motel in Phoenix, Arizona, which petitioner and Cucitro would photograph. The scenes were photographed with one motion picture camera using black and white film and another using color film. Petitioner and Cucitro took the black and white film to a local camera store in Phoenix where an employee advised petitioner that the film would have to be developed by a commercial film processor in Denver. Petitioner gave the film to the employee, who mailed it to the film processor in Denver. After developing the film, the processor turned it over to a United States Postal Inspector. The color film, pursuant to a contractual agreement covering it, was mailed directly by petitioner to the same film processor in Denver, who developed it and then turned it over to the Postal Inspector. The parties stipulated at trial that the motion picture films were obscene within the meaning of 18 U.S.C. 1461.

ARGUMENT

1. Petitioner contends that the trial judge erred in refusing to give his requested instruction that the jury could not convict unless it found that, as the sender of the materials, he "specifically intended at the time of the mailing that the materials when received and viewed by the recipient would arouse or appeal to the prurient interests of the recipient" (Pet. 5). As the court of appeals held, however, even had

such an instruction been appropriate at all,[2] it would have been so only to the issue of the obscenity of the mailed materials. It had no proper bearing on the type of specific intent required for a violation of Section 1461. Having stipulated that the materials were legally obscene, presumably in order to avoid having the jury view them, it is not open to petitioner to contend that the court failed to give an instruction pertaining to the obscenity of the films. The trial judge correctly charged, with relation to the issue of specific intent, that the jury could convict only if it found that petitioner had participated wilfully in the crime. The court defined participation as wilful "if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law"

[2] An instruction that the sender must have intended that the materials appeal to the prurient interest of the recipient has been held erroneous under the standards for determining obscenity set forth in *Roth* v. *United States*, 354 U.S. 476 and *Memoirs* v. *Massachusetts*, 383 U.S. 413. See *Armijo* v. *United States*, 384 F. 2d 694 (C.A. 9), certiorari denied, 390 U.S. 974; *Ackerman* v. *United States*, 293 F. 2d 449, 453 (C.A. 9). Thus, even had the issue of obscenity in this case not been conceded, the denial of petitioner's requested instruction would have been correct. The proper standard is whether the content of the material would have a prurient appeal for the "average person" or an intended sexually "deviant group"; *Mishkin* v. *New York*, 383 U.S. 502, not whether it would be regarded as prurient by a particular recipient. See Memorandum in Opposition in *Armijo*, *supra*, No. 917 Misc., O.T., 1967.

(R. Vol. III, 276). This instruction was proper [3] and would, as the court below noted (Pet. App. 22), exclude the case alluded to in petitioner's brief of a law enforcement officer who sent the obscene materials through the mails for use as evidence.

2. Petitioner raises various contentions concerning the propriety of his prosecution under the policy of the Department of Justice with respect to 18 U.S.C. 1461, announced in *Redmond* v. *United States,* 384 U.S. 264. There, upon the suggestion of the Solicitor General, this Court vacated convictions under Section 1461 and remanded to the district court for dismissal of the information. *Redmond* involved a husband and wife convicted for having sent and received obscene photographs of each other through the mails. In our memorandum we pointed out that the Department's policy was to prosecute for mailing and receiving private correspondence only in "those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated," since it "is the Department's view that generally no useful purpose is served by a felony conviction of individuals who have willingly exchanged private letters, although obscene" (Memorandum for the government in No. 1056, O.T., 1965, p. 4).

The court below held that the *Redmond* policy could not be enforced by the courts but only by United States prosecutive officials, who had not moved in this case for dismissal of the charges; and that, in any event, this case did not fall within the class of cases

[3] See *Gagliardo* v. *United States*, 366 F. 2d 720, 724 and n. 5 (C.A. 9).

which the Department announced that it would not prosecute (Pet. App. 20–21). We regard prosecution of the present case as consistent with the policy set forth in our memorandum in *Redmond*. The critical distinction is, as the court below noted (Pet. App. 21), that unlike in *Redmond* (and see also *Cox* v. *United States*, 370 F. 2d 563 (C.A. 9)), there is no showing here that the materials were for the private use of petitioner and his co-defendant. Indeed, the photographing in both color and black and white motion picture film of "actors" engaging in sexual intercourse suggests an entirely different use than the "private correspondence" contemplated by the Department's policy announced in *Redmond*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1969.

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